STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK SHRONEA NELSON,

Defendant-Appellant.

UNPUBLISHED
September 28, 2006

No. 262290
Genesee Circuit Court
LC No. 05-015516-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of unlawfully driving away an automobile, MCL 750.413. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to three to fifteen years' imprisonment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was denied a fair trial when one of the police witnesses gave a nonresponsive answer to the prosecutor's chain of evidence question and volunteered the information that defendant was incarcerated between the time of the offense and his trial. We disagree. A verdict in a criminal case may not be reversed on the basis of the improper admission of evidence unless the error affected a substantial right of the defendant, affecting the outcome of the trial and resulting in a miscarriage of justice. *People v Whitaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001). An error is outcome determinative if it undermines the reliability of the verdict in the light of the weight and strength of the untainted evidence. *Id.* at 427.

Generally, an unresponsive, volunteered answer that injects improper evidence into a trial is not grounds for a mistrial unless the prosecutor knows in advance that the witness will give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Police witnesses have a special obligation not to venture into forbidden areas. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). A police officer's testimony that is nonresponsive and volunteers information is subject to special scrutiny but does not typically warrant a new trial. *Hackney*, *supra* at 531; *Holly*, *supra* at 415-416. Moreover, a jury is presumed to follow the instructions, and instructions are presumed to cure most errors. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005).

The testimony at issue here related to a distinctive hat, a blue and white striped stocking cap, with little balls hanging on the back. A witness to the theft of the car testified that the driver wore this distinctive hat. The officers who responded to the call about the stolen vehicle testified that when they spotted the stolen vehicle at a gas station, the only customer inside the station was wearing such a hat. The hat being therefore somewhat critical to the prosecutor's case, it came up in questioning several times.

The following exchange between the prosecutor and Officer Williams is the challenged testimony.

> *Q.* Okay. Let's take the first thing first or the last thing in this case, this infamous hat. The hat, when did you acquire the hat?
>
> *A.* Well are you talking about today's date I acquired it or originally when it was –
>
> *Q.* Originally.
>
> *A.* Originally when this was acquired, I'm sorry, acquired, it was – the defendant was wearing the hat.
>
> *Q.* Okay.
>
> *A.* That would have been on the 4th of January when he was taken into custody.
>
> *Q.* Okay. And then you've been sitting here in court and we've had testimony about the hat, and did you go and retrieve the hat today?
>
> *A.* Yes, sir, I did.
>
> *Q.* Okay. And how did you retrieve it?
>
> *A.* I went down to the Genesee County Sheriff's Department at the jail where the defendant's been held since his arrest and –
>
> Mr. SKINNER [defense attorney]: Well, you know, Judge, I wish the officer hadn't said that, you know?
>
> THE COURT: Well, we don't want to volunteer everything we think of, you know, just answer the questions.
>
> THE WITNESS: Sorry, ma'am.
>
> THE COURT: Thank you.
>
> THE WITNESS: I went down and obtained it from the Genesee County Jail.
>
> *Q.* Okay, from the defendant's property?

A. Correct. [Tr II at 238.]

We agree that the prosecutor perhaps ought to have anticipated this line of questioning might reveal that defendant had been incarcerated while awaiting trial, and would caution prosecutors against opening the door to such potentially prejudicial answers. However, on the facts of this case we find that the officer's answer was not directly responsive to the question asked, and that although the answer volunteered the fact of defendant's incarceration, it was not inherently prejudicial and was not outcome determinative. Immediately after the officer's improper comment, defense counsel objected, and the court instructed the officer to just answer the questions and not volunteer information. Outside the jury's presence, defense counsel asked for an instruction that the jury should not consider defendant's incarceration, the court indicated that it would so instruct the jury, and both parties approved the instruction. During closing arguments, defense counsel told the jury that defendant was in jail from the time of his arrest until trial because he did not have the financial ability to post a bond for his release. The court instructed the jury that the fact that defendant had been in jail since the alleged crime occurred was not evidence of his guilt. The jurors are presumed to have followed the court's curative instruction. Moreover, the untainted evidence against defendant was substantial. The complainant's car was found shortly after it was taken at a gas station. Defendant's footprints in the snow led from the car to the gas station entrance and matched the footprints leading to where the car had been parked when it was taken. Defendant's claim that he walked from a trailer park was not corroborated by his footprints in the snow coming from the trailer park. When he was apprehended at the gas station, defendant was wearing a hat that matched the description given by an eyewitness of a hat worn by the person who drove away the complainant's car. Finally, collections of coins were found in the car after defendant was observed exchanging coins for bills in the gas station.

Accordingly, we conclude that the officer's nonresponsive statement did not undermine the reliability of the verdict considering the weight of the untainted evidence.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper